No. 80-544

IN THE

Supreme Court of the United States

October Term, 1980

FIRST NATIONAL MAINTENANCE CORP.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The issue in this case is whether an employer violated its bargaining obligation under the National Labor Relations Act when, without prior bargaining, it made a decision to close a part of its operations resulting in the termination of certain employees who were then represented by a labor organization.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATUTE PRESENTED	2
STATEMENT OF THE CASE	2
A. FACTS INVOLVED	2
B. THE PROCEEDINGS BELOW	3
SUMMARY OF ASPA ARGUMENTS	4
ARGUMENT	4
I. THE VARIOUS APPROACHES TO PARTIAL CLOSURES	4
A. HISTORICAL DEVELOPMENT	4
B. THE REBUTTABLE PRESUMPTION	6
II. IS A PARTIAL CLOSURE "TERMS AND OTHER CONDITIONS OF EMPLOYMENT" WITHIN THE FIBREBOARD DECISION?	10
A. THE DIFFERENCE BETWEEN PARTIAL CLOSURE AND SUBCONTRACTING	10
B. THE CONCEPT OF A UNILATERAL CHANGE	12
C. THE RELEVANCE OF CONCURRENT CONTRACT NEGOTIATIONS TO PARTIAL CLOSURE DECISIONS	14
CONCLUSION	15

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TABLE OF AUTHORITIES

Page

Cases:

Brockway Motor Trucks v. NLRB, 582 F. 2d 720, 99 LRRM 2013 (3rd Cir., 1978) 6, 7, 8, 9, 11, 14

Darlington Manufacturing Co. v. NLRB, 397 F. 2d 760, 68 LRRM 2356 (4th Cir., 1968) 9

Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203, 57 LRRM 2609 (1964) 4, 5, 7, 10, 11, 12, 14

NLRB v. Adams Dairy, Inc., 350 F. 2d 108, 60 LRRM 2084 (8th Cir., 1965) cert. denied 382 U.S. 1011, 61 LRRM 2192 (1966) 6, 8, 10, 14

NLRB v. American Manufacturing Co., 351 F. 2d 74, 60 LRRM 2122 (5th Cir., 1965) 6

NLRB v. Borg-Warner Corp., 356 U.S. 342, 42 LRRM 2034 (1958) 15

NLRB v. First National Maintenance Corp., 242 NLRB No. 72 ..... 2, 3

NLRB v. Insurance Agents Union, 361 U.S. 477, 45 LRRM 2705 13

NLRB v. Katz, 289 F. 2d 700 13

NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962) 13

NLRB v. Royal Plating and Polishing Co., 350 F. 2d 191, 60 LRRM 2033 (3rd Cir., 1965) . 6, 8, 9

NLRB v. Thompson Transport Co., 406 F. 2d 698, 70 LRRM 2418 (10th Cir., 1969) 6

Page

NLRB v. Transmarine Navigation Corp., 380 F. 2d 933, 65 LRRM 2861 (9th Cir., 1967) 6

NLRB v. Winn-Dixie Stores, Inc., 361 F. 2d 512, 62 LRRM 2218 (5th Cir.) cert. denied 385 U.S. 935 (1966) 6

Ozark Trailers, Inc., 161 NLRB 561, 63 LRRM 1264 (1966) 5, 10

Statute:

National Labor Relations Act, Section 8(d), 29 U.S.C. 158(d) 2, 11, 12, 13

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BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This amicus curiae brief is respectfully submitted by the American Society for Personnel Administration (hereinafter referred to as ASPA),[1] which is an association composed of professional personnel administrators and industrial relations practitioners engaged in business, industry, government and education. Firms represented by the membership of ASPA have an aggregate employment of in excess of 27 million employees.

[1] Pursuant to Supreme Court Rule 36, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters manifesting such consent have been filed with the Clerk of the Court.

STATUTE PRESENTED

Section 8(a) of the National Labor Relations Act (61 Stat. 141, as amended, 73 Stat. 542-543; 29 U.S.C. 158(a)) provides in relevant part:

> "(a) It shall be an unfair labor practice for an employer
>
> * * *
>
> "(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of Section 9(a)."

STATEMENT OF THE CASE

A. Facts Involved

First National Maintenance Corp., a commercial cleaning and maintenance firm, was organized by a labor organization which was certified on May 11, 1977. At a time when the labor organization had requested collective bargaining but no collective bargaining had taken place, First National Maintenance Corp. made a decision to discontinue an unprofitable portion of its operation. This decision was made without prior negotiations with the labor organization which represented its employees. Approximately thirty-five (35) employees were terminated as a result of the decision. It is established, for purposes of this proceeding, that the motivation for this decision was purely economic resulting from financial losses on the discontinued operation. Also, it is established that First National Maintenance Corp.'s losses were not the result of labor costs, but were the result of an unsatisfactory management fee arrangement.

B. The Proceedings Below

This matter was initially decided by the National Labor Relations Board pursuant to a complaint of its General Counsel alleging that First National Maintenance Corp. violated its bargaining obligation by discontinuing a portion of its operations without first negotiating with its Union. The National Labor Relations Board found that First National Maintenance Corp. violated its bargaining obligation by acting unilaterally, without first negotiating with its Union, regarding the decision to terminate an operation. (242 NLRB No. 72) The Board adopted the rationale that a partial closure of operations which has an adverse impact upon employee job opportunities falls within the statutory definition of "wages, hours, and other terms and conditions of employment". Therefore the Board ruled that where such employees have a representative for purposes of collective bargaining, the bargaining obligation includes the obligation to notify and negotiate with the representative the decision to partially close.

The United States Court of Appeals for the Second Circuit enforced the Board's Order, but in doing so, rejected the Board's rationale that any partial closure adversely affecting employee job opportunities raises an obligation to bargain concerning the decision.[2] The Court determined that a partial closing raises a presumption that a duty to bargain exists which could be rebutted by a determination of the "relative merits" of the arguments bearing on whether to impose a duty to bargain in a particular case.[3] Regarding the relative merits of the case before it, the Court ruled that the loss of money

[2] 627 F. 2d at 596.
[3] 627 F. 2d at 601.

by First National Maintenance Corp. alone was insufficient to rebut the presumptive bargaining obligation and, accordingly, the Board's Order was enforced.

SUMMARY OF ASPA ARGUMENTS

The ASPA contends that a partial closure of operations by an employer free of anti-union motivation should raise no bargaining obligation as to the decision. The ASPA contends that there is no statutory basis for such a requirement either on the per se approach adopted by the Board or on the presumptive basis enunciated by the Court below and other circuit courts. The ASPA contends that, in reality, bargaining regarding management decisions concerning entrepreneurial matters is unworkable and illusory.

ARGUMENT

I. THE VARIOUS APPROACHES TO PARTIAL CLOSURES

A. Historical Development

The legal underpinning for the authorities that hold that in any circumstances an employer must bargain about a decision to partially close an operation stems from this Court's decision in *Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203, 57 LRRM 2609 (1964). Although the Court below commented that the *Fibreboard* decision did not "fully determine the issue"[4] and, furthermore, provided "lack of clear direction",[5] nevertheless the Court found it applicable. Thus, the Court stated:

[4] 627 F. 2d at 599.
[5] 627 F. 2d at 599.

"Fibreboard also indicates the inappropriateness of a per se rule pointing in the other direction." 627 F. 2d at 601.

The National Labor Relations Board has historically treated partial closures as virtually indistinguishable from the subcontracting dealt with in *Fibreboard*. Explaining its position with respect to partial closures, the Board made clear in *Ozark Trailers, Inc.*, 161 NLRB 561, 63 LRRM 1264 (1966), that it considered the *Fibreboard* decision to provide the full basis for its holding that partial closure decisions were bargainable.[6] However, in addition to the application of the pure legal precedent of *Fibreboard*, the Board appears to go further and employ a notion of the "greater good" in its partial closure rationale. For example, the Board clearly considers such bargaining to be mutually beneficial. The Board stated:

". . . [A]n employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. Hence, to compel an employer to bargain is not to deprive him of the freedom to manage his business." 161 NLRB at 568.

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[6] "So here a termination of employment was the necessary result of Respondent's decision to close the Ozark plant. Thus, here, just as in *Fibreboard*, the Respondents have failed to bargain concerning the 'terms or conditions of employment.'" 161 NLRB at 565.

Further, the Board stated:

> "In short, we see no reason why employees should be denied the right to bargain about a decision directly affecting terms and conditions of employment which is of profound significance for them solely because that decision is also a significant one for management." 161 NRLB at 567.

One Circuit Court apparently accepts the position of the Board that partial closure decisions adversely affecting employment are per se bargainable. *NLRB v. Winn-Dixie Stores, Inc.*, 361 F. 2d 512, 62 LRRM 2218 (5th Cir.), cert. denied, 385 U.S. 935 (1966); *NLRB v. American Manufacturing Co.*, 351 F. 2d 74, 60 LRRM 2122 (5th Cir., 1965). Other Circuit Courts have denied the Board enforcement of its orders for a variety of reasons which will be discussed more fully herein.[7]

B. The Rebuttable Presumption

The Second Circuit in the instant case and the Third Circuit in *Brockway Motor Trucks v. NLRB*, 582 F. 2d 720, 99 LRRM 2013 (3rd Cir., 1978) have held that a decision to partially close operations raises a rebuttable presumption that bargaining is required. The Court below considered partial closures to be "an area whose parameters are not clearly defined by the statute or by Supreme Court precedent."[8] The Court, however, did read *Fibreboard* as indicating the inappropriateness of finding that a partial closure decision was

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[7] *NLRB v. Adams Dairy, Inc.*, 350 F. 2d 108, 60 LRRM 2084 (8th Cir., 1965) cert. denied, 382 U.S. 1011, 61 LRRM 2192 (1966); *NLRB v. Thompson Transport Co.*, 406 F. 2d 698, 70 LRRM 2418 (10th Cir., 1969); *NLRB v. Transmarine Navigation Corp.*, 380 F. 2d 933, 65 LRRM 2861 (9th Cir., 1967); *NLRB v. Royal Plating and Polishing Co.*, 350 F. 2d 191, 60 LRRM 2033 (3rd Cir., 1965).

[8] 627 F. 2d at 601.

per se not bargainable. The Court so concluded based on the following dicta from *Fibreboard:*

> "Although it is not possible to say whether a satisfactory solution could be reached, National Labor Policy is founded upon the Congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation." 379 U.S. at 214.

The *Brockway* Court, likewise, read *Fibreboard* as not supporting the per se approach taken by the Board but, rather, considered *Fibreboard* to counsel "a practical balancing approach to the problem of articulating the scope of the employer's duty to bargain under the NLRB."[9] Both Courts, therefore, read *Fibreboard* as authority for a middle ground where, under some circumstances the decision would be bargainable, and under others, it would not. In *Brockway*, the Court adopted a test based on the probability of the success of bargaining with respect to the decision. The Court noted the concern of employees over the prospect of losing their jobs and went on to state:

> "In particular, to the extent that *Brockway's* decision to shut down one of its facilities is the result of high costs of production, it is possible that the Union might undertake to reduce labor expenses and, thereby, alter the calculation that led to the employer's determination in the first place. Indeed labor history is replete with instances where a union has cooperated actively with an employer to keep a company financially afloat and, thus, to prevent the closing of a facility and the loss of jobs." 582 F. 2d at 735-6.

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[9] 582 F. 2d at 732.

The employer's assertion of "economic considerations" was held to be insufficient rebuttal. However, because it appeared at oral argument that the employer may have gone totally out of business, the Court denied enforcement without prejudice to the NLRB to commence additional proceedings.

In the present case, the Court below agreed with the *Brockway* Court that a partial closure raised a presumption that the duty to bargain existed. The Court read the *Brockway* decision as creating a balancing of interests approach in determining whether the presumption has been rebutted. The Court rejected the *Brockway* approach and adopted a "relative merits of the arguments" test.[10] This included whether the bargaining might be futile, whether an emergency existed, an examination of industry custom and practice, and possible danger to the vitality of the entire business.

Earlier Circuit Court decisions indicate that a similar type of balancing approach has been applied without necessarily articulating the rebuttable presumption concept. Thus, *Royal Plating and Polishing*,[11] which the *Brockway* Court did not criticize, apparently was a case in which bargaining would have been futile and in which the employer had a relatively urgent need for action. In *Adams Dairy*,[12] it was noted that prior bargaining with respect to subcontracting had not born fruit and, further, that the employer's actions involved substantial capital decisions.

It is respectfully submitted that attempted resolution of partial closure cases according to the reason asserted for the closure is simply not practicable or workable. Reasons given

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[10] 627 F. 2d at 601.
[11] Note 7, *supra*.
[12] Note 7, *supra*.

for partial closures have ranged from a bare assertion of "economic considerations"[13] simple, unprofitability of the operation,[14] and to delicate negotiations with the Housing Authority.[15] We may add to the potential reasons for a partial closure a simple wish on the part of an entrepreneur to be done with a particular line of business and invest his money elsewhere. (In all cases, of course, we are assuming the absence of a discriminatory motive for which, if it does exist, other adequate remedies are available.)[16] When it comes to balancing of interests, it should be remembered that in every case the interests on the employees' side will be the same. That interest will be the interest of the employees in continuing to hold their jobs. By definition, the interest on the employer's side will be economic. The decisions of the Board and the Circuit Court's finding a bargaining obligation in this setting obviously assume that bargaining will be a salutary effort for the employer in that it might alleviate the perceived economic problem in the form of lower wages, productivity concessions and the like. This approach ignores the realities that where such problems exist with such potential solutions, together with the will of the parties to solve them, the problems get solved of their own without the intervention of the Board or the Courts. Conversely, where neither the solution nor the will to solve exists, no amount of bargaining will cure the problem. Therefore, to the extent that the Board and the Courts feel that they are shaping the law toward the constructive solution of problems, they are in error. Moreover, whether their approach be salutary or not, it should not be imposed if not required by law.

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[13] *Brockway Motor Trucks v. NLRB, supra.*

[14] As in the instant case.

[15] *NLRB v. Royal Plating and Polishing Co., supra.*

[16] E.g., *Darlington Manufacturing Co. v. NLRB,* 397 F. 2d 760, 68 LRRM 2356 (4th Cir., 1968).

II. IS A PARTIAL CLOSURE "TERMS AND OTHER CONDITIONS OF EMPLOYMENT" WITHIN THE *FIBREBOARD* DECISION?

A. The Difference Between Partial Closure and Subcontracting

Perhaps the reason the partial closure cases have caused so much conceptual difficulty is that in some instances they are similar to subcontracting. Thus, in *Adams Dairy*, the employer continued in business after the change in operations utilizing independent contractors in place of its own employees. In *Ozark Trailers*, the employer continued in business after the partial closure obtaining truck bodies from an outside source. These similarities are, no doubt, what led to the application of *Fibreboard* to partial closings. However, it is submitted that the application is in disregard of clear directives of this Court in the *Fibreboard* decision. The distinction between the subcontracting involved in *Fibreboard* and partial closures can be found in the text of the *Fibreboard* decision itself. Thus, the Court stated:

> "The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment." 379 U.S. at 213.

Further, the Court stated:

> "We are, thus, not expanding the scope of mandatory bargaining to hold as we do now that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under Section 8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." 379 U.S. at 215.

The Court of Appeals in the *Brockway* case in finding that partial closure related to terms and other conditions of employment stated as follows:

> "Just as subcontracting is likely to lead to the termination of employment, so too will the closing down of an employer's plant—and, thus, the latter act 'might appropriately be called a condition of employment'." 582 F. 2d at 735.

This holding relies on the holding in *Fibreboard* that the subcontracting resulted in terminations of employment and, therefore, involved "terms and other conditions of employment." It is respectfully submitted that the reasoning of the *Brockway* Court is erroneous. In *Fibreboard*, the Court was confronted with what literally amounted to a direct termination of employment. Thus, an employer without otherwise changing its operations substituted one group of employees for another. Nothing more was involved by way of capital investment or entrepreneurial decision. The termination involved before the *Brockway* Court was a step removed. The

decision involved was not who would do certain work, but rather whether certain work would be done at all. That there was a *resulting* termination does not make the decision bargainable. Stated another way, while a decision to terminate may be bargainable, a decision with respect to capital investment which results in termination should not be bargainable. Many entrepreneurial decisions affect employment opportunities. A decision to acquire new equipment or modernize a plant may result in increased and enhanced employment opportunities. Yet, this type of decision is clearly not bargainable. A fair reading of the *Fibreboard* decision shows nothing that indicated this court intended to make entrepreneurial decisions bargainable, notwithstanding that they may have a *resulting impact* on terms and conditions of employment. Indeed, the concurring opinion in *Fibreboard* specifically disclaimed any intention that "every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain." 379 U.S. at 218. Plainly, then, there is ample room for distinction between the subcontracting in *Fibreboard* and the partial closure in the instant case.

B. The Concept of a Unilateral Change

Section 8(b) of the National Labor Relations Act obligates employers and labor organizations to ". . . meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . ."[17] The Board's theory that a partial closure without prior bargaining as to the decision is a violation is in effect a contention that the employer has acted unilaterally with respect to bargainable matters. This concept of a violation of the law in unilateral

[17] National Labor Relations Act Section 8(d), 29 U.S.C. §158(d).

action was first espoused by this Court in the case of *NLRB v. Katz*, 369 U.S. 736, 50 LRRM 2177 (1962). In that case, an employer, acting without improper motive, made unilateral changes in wages and benefits during the course of negotiations with a union. The Circuit Court of Appeals for the second Circuit had denied enforcement of the Board's cease and desist order holding that the statutory duty to bargain cannot be held to be violated when bargaining is in fact being carried on without a finding of the employer's subjective bad faith in negotiations. *NLRB v. Katz*, 289 F. 2d 700. The Circuit Court rested its decision upon the decision of this Court in *NLRB v. Insurance Agents Union*, 361 U.S. 477, 45 LRRM 2705. This Court, in reversing the Circuit, stated as follows:

> "A refusal to negotiate in fact as to *any subject which is within Section 8(d)* and about which the Union seeks to negotiate, violates Section 8(a)(5) though the Employer has every desire to reach agreement with the Union upon an overall collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of Section 8(a)(5) for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal." (Emphasis supplied. 369 U.S. at 743.)

Thus, it can be seen that not all unilateral action is forbidden, but only unilateral action with respect to subjects within Section 8(d). As noted above, those authorities finding a bargaining obligation with respect to partial closures do so on the theory that a decision regarding termination is involved. If that were the decision involved, it would fall within Section

8(d) and, therefore, would be an improper subject for unilateral action. However, the decision for which bargaining is sought is not a decision to terminate as such, but a decision with respect to the nature and form of a business which may result in a termination. As noted above, *Fibreboard* literally involved a termination decision inasmuch as the sole question was who was going to do the work that was otherwise going to be done. *Fibreboard* is stretched too far to make this reasoning applicable to a decision to cease a portion of an operation.

C. The Relevance of Concurrent Contract Negotiations to Partial Closure Decisions

Two Circuit Courts have attached significance to the question of whether contract negotiations were concurrently in progress in determining whether a partial closure decision was a mandatory subject of bargaining. In *Adams Dairy* the Court regarded the fact that contract negotiations were not concurrent as an important distinction from *Fibreboard* in which they were and, accordingly, "there was little or no excuse for not negotiating the disputed issue . . ."[18] Conversely, the Court, in *Brockway Motor Trucks*, attached significance to the fact that negotiations were concurrently in progress and stated that this "dramatically distinguishes" the *Adams Dairy* case.[19] While it is true that negotiations were concurrently in progress at the time of the subcontracting in *Fibreboard*, there is nothing in this Court's decision to indicate any significance was attached to that fact. It may be that the Third and the Eighth Circuits would regard an employer's conduct in failing to mention the proposed change at a time

[18] 350 F. 2d at 113.
[19] 582 F. 2d at 728.

when it might logically be raised as being reprehensible or perhaps clandestine. In any event, ASPA contends that the point is immaterial. We here treat whether a particular subject, i.e., a partial closing decision, is a mandatory or non-mandatory subject of bargaining. If it is non-mandatory, it does not change its status simply because negotiations are in progress. This Court has held that a party may refuse to negotiate concerning a non-mandatory subject even though negotiations may be currently in progress. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 42 LRRM 2034 (1958).

CONCLUSION

For the foregoing reasons, the amicus curiae respectfully submits that the decision of the U.S. Court of Appeals for the Second Circuit should be reversed and remanded with directions to deny enforcement to the Board's Order.

Respectfully submitted,

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